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C O N F I D E N T I A L SECTION 01 OF 02 KYIV 000988

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SUBJECT: UKRAINE: COURT WRAPPING UP OPEN HEARINGS AS
POLITICAL NEGOTIATIONS EXPAND

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Classified By: Ambassador for reasons 1.4(a,b,d).

¶1. (SBU) Summary. The Constitutional Court moved into the closed deliberation phase late on April 25, amid rumors that a judgment was expected by the end of Friday April 27 (although others predict a later decision after the May 1-9 holidays). Court deliberations April 24 had concluded late in the evening with brief testimony by a representative from the Central Election Commission (CEC); the CEC considered President Yushchenko had the constitutional right to dissolve the Rada, but the CEC could not comply with the May 27 date for new elections as proposed in the decree for technical reasons. The concluding open session April 25 allowed justices to question CabMin rep Nimchenko on issues raised by a written brief submitted by CabMin rep Lukash. Then the petitioner and all interested parties gave their closing arguments. Meanwhile, previous political consultations between President Yushchenko and PM Yanukovych expanded April 25 into broader working group talks between opposition and coalition representatives on a political way forward.

¶2. (C) Comment. A majority of judges appear to favor wrapping up the proceedings as quickly as possible, with a five day May Day holiday weekend looming, although other observers speculate that a decision would come after the long weekend. Judge Pshenychniy, one of the three Kuchma appointees on the Court, pointedly commented: "there are ten professional judges on this Court" who did not necessarily need to have sat through the open hearings in order to render a decision, implying that a majority appear ready to rule against Yushchenko's decree. Judges appointed on Yushchenko's quota have tried to raise the issue of disrespect of the court by the repeated refusal of Rada and CabMin representatives to answer their questions, but their concerns have been discounted, at least in open session discussions. Whether their ruling comes before or after the political compromise remains to be seen. By cutting the number of witnesses making presentations, the coalition appears to be pushing for a fast end to the case; a ruling in their favor could boost their negotiating power in the search for political compromise. End summary and comment.

CEC Keeps Statement Brief

¶3. (SBU) The CEC testimony on the evening of April 24 was short and focused on the two points of Yushchenko's decree related to new elections. According to CEC representative Stavniychuk, the CEC believed the President had the constitutional right to call preterm elections. However, the CEC could not organize an election by May 27 because the campaign should already be underway, there was no financing

and only two parties had registered to participate. Her personal opinion, which she made clear was not shared by the entire CEC, was that the current crisis was an internal parliamentary problem and the conditions for dissolving the Rada should be spelled out concretely in the constitution. Stavniychuk also stated that, if there were new elections, a new election law should be prepared. The transitional provision of the 2004 constitutional amendments that governed a full party-list system had expired, she noted; the CEC and a group of MPs were working on new electoral code that would return the Rada to some hybrid form of elections. (Note. Prior to the March 2006 elections, half the Rada was elected on party lists and half in single-mandate districts. The recent PACE resolution on Ukraine also highlighted the need for a move towards more connection between MPs and specific constituencies of voters. End note.) Stavniychuk also complained that constant court decisions (from lower courts) were precluding the CEC from doing its job.

Validity of Decree Questioned

¶4. (SBU) In the April 25 Court session, with most of the Rada and CabMin representatives absent, discussion focused on Judge Dzhun's question whether or not the decree should be considered valid based on how it had been promulgated--the Court can only consider a valid document, so the case would be thrown out if the document was not valid. Rada rep Selivanov started off arguing that the decree was not promulgated properly since the Ministry of Justice had not registered Yushchenko's April 2 decree, and neither the Cabinet nor the Rada's papers had published it. However, after a short break, Selivanov retracted his position and said the decree is valid, because presidential decrees are not published in those two publications. CabMin rep Nimchenko agreed that the Presidential Journal (Presydentskiy Visnyk), which published the decree--can officially promulgate presidential decrees.

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¶5. (C) Note: Judge Dzhun, identified as being affiliated with the Party of Regions, has taken a number of interesting positions in his questions and comments. He had proposed to postpone the CEC testimony until April 25, despite clear efforts by coalition-appointed judges and reps to speed up the process. Dzhun had earlier publicly supported a Yushchenko-quota judge's comments that the Rada's representatives to the Court were showing disrespect to the Court by refusing to answer questions. End Note.

¶6. (SBU) Nimchenko continued to refuse to answer questions from the judges who held the April 10 press conference alleging pressure on the Court. Judge Lylak was offended and proposed to go into closed session to discuss the disrespect. Some of the judges who voted against Lylak's proposal claimed presenters were not obligated to answer all questions. Judge Pshenychniy (Kuchma appointee) said that the Court had 10 professional judges and had not needed to have the open hearings they had been conducting--the Court could have reached the same conclusions based on a review of written positions. His comment appeared to imply that a majority of judges had already concluded that Yushchenko's decree was not constitutional. He also reminded the Court that it had until May 5 to make a decision.

New Roundtable: Coalition and Opposition Meet

¶7. (SBU) In the aftermath of a series of meetings between Yushchenko and Yanukovych, a much wider range of representatives of the coalition and opposition sat down together early on April 25 for the first time since the crisis began to work on a political compromise. Participants in the closed-door meeting included: OU leader Kyrylenko; BYuT deputy leader Turchynov; former Rada Speaker Plyushch;

former Finance Minister Pynzenyk (BYuT); Communist leader Symonenko; deputy Rada Speaker and Communist deputy leader Martynyuk; Regions faction leader Bohtyрева; DPM/Finance Minister Azarov; Cabinet Minister Tolstukhov; and Socialist MP Matvienkov. Details were not forthcoming, although one unnamed participant told the press they were discussing the possibility of early Rada elections. After the initial session ended, Bohtyрева told the press that the group would reconvene late in the afternoon of April 25, noting that talks could continue for some time. She also declined to comment on rumors that she might replace Moroz as Speaker; she promised an answer on April 26. (Note: Speaker Moroz is on a two-day trip to Lithuania).

¶8. (U) Visit Embassy Kyiv's classified website:
www.state.sgov.gov/p/eur/kiev.

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